

Objection to the Modification Request for NPDES General Permit No. ING040239
Bear Run Mine
Peabody Midwest Mining
Sullivan, Sullivan County, Indiana
2013 OEA 36, (10-W-J-4386)

OFFICIAL SHORT CITATION NAME: When referring to 2013 OEA 36 cite this case as
Peabody Midwest Mining, 2013 OEA 36.

TOPICS:

water quality	summary judgment
total maximum daily load (TMDL)	general permit
wasteload allocation(WLA)	coal mine
impaired waters	stormwater
segments	discharge
existing uses	receiving waters
Notice of Intent (NOI)	dissolved solids (TDS)
Tier II antidegradation	Sulfate
enforceable	NPDES
best management practices	303(d)
monitoring	Rule 7
evidence	327 IAC 2-1-2
Motion to Exclude	327 IAC 15-2-7
relevance	327 IAC 15-2-9
Official Notice	327 IAC 15-7
Judicial Notice	

PRESIDING LAW JUDGE:

Catherine Gibbs

PARTY REPRESENTATIVES:

IDEM: April Lashbrook, Esq.
Petitioners: Albert Ettinger, Esq.
Jessica Dexter, Esq.; Environmental Law and Policy Center
Kim Ferraro, Esq.; Hoosier Environmental Council
Permittee: W.C. Blanton, Esq; Alison M. Nelson, Esq.; Husch Blackwell LLP

ORDER ISSUED:

September 11, 2013

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

Nunc Pro Tunc Order issued September 19, 2013

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IN THE MATTER OF:)
)
OBJECTION TO THE MODIFICATION REQUEST FOR)
NDPES GENERAL PERMIT NO. ING040239)
BEAR RUN MINE)
PEABODY MIDWEST MINING, LLC)
SULLIVAN, SULLIVAN COUNTY, INDIANA)
_____) CAUSE NO. 10-W-J-4386
Sierra Club,)
Petitioner,)
Peabody Midwest Mining LLC,)
Permittee/Respondent,)
Indiana Department of Environmental Management,)
Respondent)

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the specific discharges from this Mine would contribute to violations of water quality standards so that the requirements of Rule 7 were insufficient to ensure compliance with these standards. Further, Sierra Club failed to present sufficient evidence to justify an individual permit or that Peabody's submission of its NOI did not comply with all requirements of the General Permit and Rule 7 requirements. Summary judgment in favor of the IDEM and Peabody is appropriate on Counts 1, 2, 4, 5 and 6.

Summary judgment is entered in favor of Sierra Club on Count 3. The IDEM failed to perform a Tier II antidegradation review as required by the rules in effect in 2010 when this modification was issued. It was Peabody's burden to make an affirmative demonstration that degradation of the receiving waters was justified by economic or social factors and would not cause violations of water quality. Peabody failed to do so at the time of the application for the Modification. The Modification is remanded to the IDEM to conduct a Tier II antidegradation review.

Objections to Evidence and Motions to Exclude Evidence

Both Sierra Club and Peabody object to certain evidence attached to the motions for summary judgment. Peabody initially objects to Sierra Club's Attachment 1 to the Amended Petition and Exhibits 3-4 and 13-14 to the Motion for Summary Judgment on the basis of relevance.

I.C. § 4-21.5-3-26(a) states: "Upon proper objection, the administrative law judge shall exclude evidence that is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts."

"Evidence is relevant if it has a tendency to prove a material fact. [*Booker, Inc. v. Morrill*, 639 N.E.2d 358, 363 \(Ind. Ct. App. 1994\)](#). The question of relevance is for the discretion of the trial judge and will be reversed only where a clear abuse of discretion is shown. *Id.* Moreover, a trial court is afforded considerable latitude in the admission or exclusion of evidence. [*Indiana Ins. v. Plummer Power Mower*, 590 N.E.2d 1085, 1088 \(Ind. Ct. App. 1992\)](#). Reversal based upon the erroneous exclusion of evidence is justified only where the evidence relates to a material matter or substantially affects the rights of the parties. [*Faulkner v. Markkay of Indiana, Inc.*, 663 N.E.2d 798, 800 \(Ind. Ct. App. 1996\)](#)." *Ford Motor Co. v. Ammerman*, 705 N.E.2d 539, 1999 Ind. App. LEXIS 151, CCH Prod. Liab. Rep. P15, 441 (Ind. Ct. App. 1999).

The determination of relevance is left to the discretion of the fact finder, in this case, the presiding ELJ. The material facts in this case revolve around the effect of storm water discharges from this coal mine. Therefore, any evidence which tends to provide support for a party's legal argument regarding the material facts should be considered relevant. It is the ELJ's province to assign the proper weight to this evidence. Each of the parties has objected to certain portions of the other party's evidence. However, in each case, the evidence objected to is being used to support the opposing party's legal argument. The evidence would be relevant *if* the ELJ agrees with these individual arguments. For example, Petitioner's Attachment 1, Exhibits 3, 13 and 14 would be relevant if the ELJ accepts Sierra Club's argument that "IDEM should have

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considered the Bear Run Mine's impact on *all* downstream waters, not just those into which an outfall directly discharges."³ The long list of Indiana Register and Federal Register Notices that Peabody seeks to introduce can be analyzed under the same standard, that is, these notices would be relevant if the ELJ accepts Peabody's argument that the OEA should consider all institutional knowledge.

Sierra Club's Exhibit 4 is more problematic. As this policy is directed to Appalachian mining, its relevance is limited. However, the ELJ may consider this document to be relevant for the limited purpose of showing which constituents might typically be found in coal mine discharges.

Consideration of the 2012 draft Final Busseron Creek TMDL is also tricky. However, if the ELJ concurs with Peabody's argument that IDEM could properly rely on institutional knowledge, then the information known by IDEM at the time the Modification was approved is relevant. The ELJ concurs with Sierra Club's argument that the 2012 document could not have been considered by the IDEM in 2010. It must be further acknowledged that the 2012 draft does not have the effect of law. However, Peabody requests that the ELJ take judicial notice of the draft Busseron Creek Watershed TMDL and the State's Antidegradation regulations as they existed in 2008. These documents are relevant as they were in existence at the time the Modification was approved.

As all of these documents possess a *tendency* to prove a material fact, the ELJ finds that the documents are relevant and therefore, the ELJ **DENIES** the all motions to strike on the basis of relevance.

I.C. § 4-21.5-3-26(f) states:

- (f) Official notice may be taken of the following:
 - (1) Any fact that could be judicially noticed in the courts.
 - (2) The record of other proceedings before the agency.
 - (3) Technical or scientific matters within the agency's specialized knowledge.
 - (4) Codes or standards that have been adopted by an agency of the United States or this state.

Pursuant to Indiana Rules of Evidence 201, judicial notice may be taken of:

- (a) **Kinds of Facts.** A court may take judicial notice of a fact. A judicially-noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

³ Sierra Club's Response to Peabody's Objections to Certain Sierra Club Evidentiary Submissions, filed April 12, 2013, pg. 2.

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- (b) **Kinds of Laws.** A court may take judicial notice of law. Law includes (1) the decisional, constitutional, and public statutory law, (2) rules of court, (3) published regulations of governmental agencies, (4) codified ordinances of municipalities, (5) records of a court of this state, and (6) laws of other governmental subdivisions of the United States or of any state, territory or other jurisdiction of the United States.

The ELJ can take official notice of the documents listed by Peabody, if relevant. Sierra Club questions the relevance of the documents but not that the ELJ can take official notice of the documents. The question of the relevance of these documents is addressed above and the ELJ has denied the motion to strike. The ELJ may consider all documents to the degree that they are relevant.

Sierra Club also objects to portions of Peabody's brief on the basis that the brief mischaracterizes Sierra Club's arguments. Such motions are disfavored. *Custom Vehicles, Inc. v. Forest River, Inc.*, 464 F.3d 725, 2006 U.S. App. LEXIS 24191, 80 U.S.P.Q.2D (BNA) 1542, 66 Fed. R. Serv. 3d (Callaghan) 328 (7th Cir. Ind. 2006). The ELJ concludes that Sierra Club has not stated sufficient grounds to justify striking any portion of Peabody's or IDEM's responses. Therefore, the motion to strike is **DENIED**.

Statement of Case

1. This matter was initiated on June 30, 2010 when the Petitioners filed their Petition for Administrative Review of the Modification of Bear Run Mine NPDES⁴ General Permit No. ING040239, which was issued on June 15, 2010. The Petition was amended on August 12, 2010.
2. On July 13, 2010, Peabody filed a Motion to Dismiss.
3. On May 27, 2011, the Hoosier Environmental Council filed its Notice of Voluntary Dismissal. The Court issued an order dismissing Hoosier Environmental Council from this cause on June 28, 2011.
4. On July 22, 2011, Sierra Club (now the sole Petitioner) filed its motion for summary judgment.
5. On August 22, 2011, the parties jointly moved to apply certain findings of fact and conclusions of law entered by the presiding ELJ in another case (Cause No. 10-W-J-4350, referred to as the "Farmersburg Case"). In the Farmersburg Case, the OEA dismissed the petitioner's attempts to invalidate Rule 7 for failure to state a claim upon which the Court could grant relief.

⁴ National Pollutant Discharge Elimination System

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6. The Court entered Findings of Fact, Conclusions of Law and Order in accordance with the joint motion on August 24, 2011 (the “August 24, 2011 Order”).
7. Sierra Club’s petition for review includes Counts 7 and 8, which sought to invalidate Rule 7. The August 24, 2011 Order dismissed Counts 7 and 8 of the petition for review.
8. In the August 24, 2011 Order, Peabody and the IDEM reserved their rights to raise the issue of “whether Sierra Club has standing to bring and prosecute this action such that OEA has jurisdiction over the subject matter of this action.”⁵ Peabody and the IDEM have not briefed this issue.
9. Briefing on Sierra Club’s motion for summary judgment was extended several times to allow for discovery, including but not limited to, time to resolve disputes regarding the 30(b)(6) deposition of Sierra Club. In addition, the parties briefed questions regarding the scope of the OEA’s review.
10. On July 10, 2012, the ELJ issued Findings of Fact, Conclusions of Law and Order Regarding the Scope of De Novo Review Before the OEA.
11. On February 15, 2013, both Peabody and IDEM filed Memoranda in Objection to Petitioner’s Motion for Summary Judgment. On the same date, Peabody filed Objections to Certain Sierra Club Evidentiary Submissions and Request for Judicial Notice.
12. On April 12, 2013, Sierra Club filed a Reply to IDEM’s and Peabody’s Responses in Opposition to Motion for Summary Judgment, Objections to Portions of Peabody’s and IDEM’s February 15, 2013 Filings and Response to Peabody’s Objections to Certain Evidentiary Submissions.
13. On April 29, 2013, Peabody filed a Response to Sierra Club’s Objections to Portions of Peabody’s and IDEM’s February 15, 2013 Filings and a Reply to Sierra Club’s Response to Peabody’s Objections to Certain Sierra Club Evidentiary Submissions.
14. Oral argument was held on April 30, 2013.
15. On May 14, 2013, Sierra Club filed a Reply to Peabody’s Response to Objections to Portions of Peabody’s and IDEM’s February 15, 2013 Filings.
16. Proposed orders were filed by all parties on June 4, 2013.

⁵ Findings of Fact, Conclusions of Law and Order, page 6, issued on August 24, 2011 by the presiding ELJ.

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17. Pursuant to I.C. § 4-21.5-3-27(g), the parties consented to an extension of time until September 13, 2013, in which to issue the Findings of Fact, Conclusions of Law and Final Order.

FINDINGS OF FACT

1. On March 25, 2010, April 12, 2010, and April 27, 2010, Peabody submitted applications for the modification of NPDES Permit No. ING040239 to the IDEM.
2. NPDES Permit No. ING 040239 (the Permit) covers discharges to waters of the State of Indiana from the Mine, located in Sullivan, Sullivan County, Indiana. This is a general permit issued under 327 IAC 15-7, the purpose of which is to "...regulate wastewater discharges from surface mining, underground mining, and reclamation projects which utilize sedimentation basin treatment for pit dewatering and surface run-off and to require best management practices for storm water run-off so that the public health, existing water uses, and aquatic biota are protected." 327 IAC 15-7-1 (hereinafter referred to as "Rule 7").
3. On June 15, 2010, IDEM approved the applications for modification. The following changes (the "Modification") to the Permit were made:
 - The following active outfalls were added for coverage:
 - Outfall 016R discharging to Buttermilk Creek
 - Outfall 018R discharging to an unnamed tributary to Black Creek
 - Proposed outfalls which were already in the Permit were ready to be constructed and activated:
 - Outfall 041N discharging to an unnamed tributary to Spencer Creek
 - Outfall 042 discharging to an unnamed tributary to Pollard Ditch
 - Mine drainage status of unconstructed Outfalls 045, 046, 049 and 050, all of which were already included in the Permit, was changed from Undetermined to Alkaline
 - Unconstructed Outfall 041S, which was in the Permit, is to be dropped as it was no longer needed.
 - New unconstructed Alkaline mine drainage status Outfalls 009, 011, and 053 through 063 were added but not activated.

(The listed outfalls shall be referred to as "the Discharges".)

4. The Hoosier Environmental Council, Sierra Club and their individual members (collectively referred to as the "Petitioners") filed for administrative review on June 30, 2010. The Petitioners filed an amended petition on August 12, 2010. The Hoosier Environmental Council was voluntarily dismissed on May 27, 2011.

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5. Before the Modification was issued, the Environmental Law & Policy Center, Hoosier Environmental Council and Sierra Club corresponded with IDEM's Commissioner on July 31, 2009, asking that all coal mines, subject to Rule 7, be required to obtain individual permits.
6. On September 29, 2009, the IDEM responded requesting additional information.
7. All findings of fact and conclusions of law entered into the record on July 10, 2013 are incorporated herein.
8. The Discharges consist of accumulated storm water runoff collected in sedimentation basins that are occasionally discharged due to precipitation events. The Discharges are episodic discharges, not the result of continuous industrial operations, so a Discharge does not occur every day. *Bruce Stevens dep.*⁶ 14:5-14:12.
9. The receiving waters for the Discharges are Buttermilk Creek; an unnamed tributary to Black Creek; an unnamed tributary to Middle Fork Creek; an unnamed tributary to Spencer Creek; an unnamed tributary to Pollard Ditch; and unnamed tributary to Buttermilk Creek; Spencer Creek; and an unnamed tributary to Maria Creek. *Amended Pet. Attach. 2.*
10. The 2008 303(d) list finds Buttermilk Creek and Busseron Creek impaired for total dissolved solids (TDS) and sulfates; Black Creek, Spencer Creek, and Brewer Ditch impaired for total dissolved solids, sulfates and "impaired biotic communities"; and Maria Creek impaired for "impaired biotic communities," and dissolved oxygen.
11. With the exception of the 2 outfalls that discharge into Buttermilk Creek, the Mine does not directly discharge into any "impaired" stream segments. *Amended Pet. Attach. 2.*
12. Sierra Club has no knowledge of and has presented no evidence of the specific constituents of the Discharges, including what metals are contained in the Discharges, the concentration of TSS in the Discharges, or the pH of the Discharges, *Sierra Club Dep.*⁷ 17:16-18:2; 18:13-18:24 & 19:10-19:18; the specific location in the receiving waters the impairment exists in relation to the outfalls, *Sierra Club Dep.* 35:21-35:25; 40:24-41:2 & 70:24-71:6; the water quality of the receiving waters for those Discharges; whether the Discharges will cause any exceedances of applicable water quality standards, *Sierra Club Dep.* 29:8-30:2, 30:3-34:9; or whether the identified impairments are the result of discharges from coal mines. *Sierra Club Dep.* 36:1-36:25, 38:25-40:16, 40:17-40:23, 46:2-47:15 & 47:21- 50:1.

⁶ Attached to Permittee/Respondent Peabody Midwest Mining, LLC's Memorandum in Opposition to Petitioner Sierra Club's Motion for Summary Judgment, filed on February 15, 2013.

⁷ All references to Sierra Club deposition refer to the deposition taken of Sierra Club Designated Representative, attached to Permittee/Respondent Peabody Midwest Mining, LLC's Memorandum in Opposition to Petitioner Sierra Club's Motion for Summary Judgment, filed on February 15, 2013.

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13. Sierra Club admits for purposes of this case that Peabody complied with the requirements for submitting a Notice of Intent letter under Rule 7. See *Sierra Club's Supplemental Response to Intervenor Peabody Midwest Mining LLC's Discovery Requests at 2*.

Applicable Law

The OEA shall consider a motion for summary judgment “as would a court that is considering a motion for summary judgment filed under Trial Rule 56 of the Indiana Rules of Trial Procedure.” I.C. § 4-21.5-3-23. Trial Rule 56 states, “The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”

The moving party carries the burden of establishing summary judgment to be appropriate. *Gibson v. Evansville Vanderburgh Building Commission, et al.*, 725 N.E.2d 949 (Ind. Ct. App. 2000). All facts and inferences must be construed and issues of doubt resolved by the court in the fashion most favorable to the non-moving party. *City of Indianapolis v. Buschman*, 988 N.E.2d 791 (Ind. 2013) *see also*; *Town of Avon v. W. Cent. Conservancy Dist.*, 957 N.E.2d 598, 602 (Ind. 2011). After the burden of proof regarding summary judgment has been established by the moving party, the burden shifts to the non moving party to demonstrate through specific evidence that there lies a genuine issue of material fact. *Bushong* at 474, (2003). “[I]t is well-settled that speculation may not be used to manufacture a genuine issue of fact.” *Amadio v. Ford Motor Co.*, 238 F.3d 919, 927 (7th Cir. 2001); *see also Borcky v. Maytag Corp.*, 248 F.3d 691, 695 (7th Cir. 2001) (“The mere existence of some alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment . . . Speculation will not suffice.”). Still, the trial court’s decision will be assessed to ensure that the nonmovant was not improperly denied his or her day in court. *Alexander v. Marion Cnty. Sheriff*, 891 N.E.2d 87, 92 (Ind. Ct. App. 2008) (quoting *City of Mishawaka v. Kvale*, 810 N.E.2d 1129, 1132-33 (Ind. Ct. App. 2004)), *trans. denied*.

Ind. R. Trial P. 56(B) states: A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof. When any party has moved for summary judgment, the court may grant summary judgment for any other party upon the issues raised by the motion although no motion for summary judgment is filed by such party.

327 IAC 15-1-1 states: “The purpose of this article is to establish NPDES general permit rules for certain classes or categories of point source discharges by prescribing the policies, procedures, and technical criteria to operate and discharge under the requirements of a NPDES general permit rule. Compliance with all requirements of applicable general permit rules may obviate the need for an individual NPDES permit issued under 327 IAC 5. A facility can operate under an individual NPDES permit and one (1) or more applicable general permit rules.”

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327 IAC 15-2-7 states: “(a) Compliance with a general permit rule constitutes compliance with all applicable standards and limitations of the Federal Act and state law.”

327 IAC 15-2-9(b) states (in pertinent part):

- (a) The commissioner may require any person either with an existing discharge subject to the requirements of this article or who is proposing a discharge that would otherwise be subject to the requirements of this article to apply for and obtain an individual NPDES permit if one (1) of the six (6) cases listed in this subsection occurs. Interested persons may petition the commissioner to take action under this subsection. Cases where individual NPDES permits may be required include the following:
 - (1) The applicable requirements contained in this article are not adequate to ensure compliance with:
 - (A) water quality standards under 327 IAC 2-1 or 327 IAC 2-1.5; or
 - (B) the provisions that implement water quality standards contained in 327 IAC 5.
 - (2) The person is not in compliance with the terms and conditions of the general permit rule.

327 IAC 15-7-1 states: “The purpose of this rule is to regulate wastewater discharges from surface mining, underground mining, and reclamation projects which utilize sedimentation basin treatment for pit dewatering and surface run-off and to require best management practices for storm water run-off so that the public health, existing water uses, and aquatic biota are protected.”

327 IAC 15-7-5 requires an applicant for a general permit to submit a Notice of Intent (“NOI”) letter. The NOI letter must include all of the information required by 327 IAC 15-3 and 327 IAC 15-7-5.

CONCLUSIONS OF LAW

1. The Indiana Department of Environmental Management (the “IDEM”) is authorized to implement and enforce specified Indiana environmental laws, and rules promulgated relevant to those laws, per I.C. § 13-13, *et seq.* The OEA has jurisdiction over and is the ultimate authority regarding the decisions of the Commissioner of IDEM and the parties to this controversy pursuant to I.C. § 4-21.5-7, *et seq.*, and per I.C. § 4-21.5.3.7(a)(1)(A).
2. Findings of Fact that may be construed as Conclusions of Law and Conclusions of Law that may be construed as Findings of Fact are so deemed.
3. The OEA has the authority to determine if the Modification was issued in accordance with the applicable statutes and regulations.

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4. Sierra Club argues that the IDEM was required to undertake certain analyses before it could properly approve the Modification. The IDEM and Peabody argue that the IDEM was not required to undertake these analyses because Rule 7 presumes compliance with the Clean Water Act (CWA)⁸. The IDEM and Peabody further assert that Sierra Club has not presented sufficient evidence to prove that the IDEM was in error by not requiring an individual permit.
5. The IDEM, in promulgating the general permits by rule assumed that certain industrial processes have similar discharges and that a permit issued under a general permit rule will meet the requirements of the CWA. However, by promulgating 327 IAC 15-2-9(b), the IDEM did not rule out the proposition that a discharger that meets the requirements for a general permit may still be required to obtain an individual permit. Therefore, the possibility exists that Sierra Club can present evidence that shows that the IDEM abused its discretion by not undertaking further analyses of the discharge from the Mine.
6. It must be emphasized that this is a motion for summary judgment and that the burden of proving that there are no genuine issues of material fact falls upon the movant, that is, Sierra Club.
7. 327 IAC 15-2-9(b) gives the IDEM the discretion to require an individual permit if the requirements of Rule 7 are not adequate to ensure compliance with the water quality standards. As this action is NOT a challenge to the validity of Rule 7, Sierra Club must submit evidence relating to how the specific discharges authorized by the Modification will cause or contribute to excursions of water quality standards in order to prevail in this action. Therefore, the ELJ does not accept the argument that the mere failure of IDEM to conduct these analyses is sufficient in and of itself for Sierra Club to prevail in this case, except as discussed in Count 3.
8. There is no question that Rule 7 is a properly promulgated rule. Further, the ELJ has previously ruled that Sierra Club may not attack the validity of Rule 7. It is presumed that this rule adequately ensures compliance with all applicable water quality standards under state and federal law.

IDEM's contentions regarding 327 IAC 15-2-9

9. The IDEM first contends that, pursuant to 327 IAC 15-2-9, it is only required to determine whether the modification application met the requirements of Rule 7 and that it *may not* require more. The ELJ agrees that the IDEM must, at a minimum, determine that an application meets the Rule 7 requirements. However, the ELJ does not agree that this is *all* that the IDEM is authorized to do. 327 IAC 15-2-9(b) explicitly gives the IDEM the discretion to require an individual permit. Therefore, the IDEM, when presented with an application for a general permit, may either (1) approve the application under the general

⁸ Clean Water Act, 33 U.S.C. 1251-1387

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permit rule or (2) may require an individual permit under one of the six instances cited in 327 IAC 15-2-9(b).

10. While the ELJ disagrees with the IDEM's argument that it *cannot* look beyond the information that must be submitted under Rule 7, it acknowledges that when 327 IAC 15-2-7 and 327 IAC 15-1-1 are read together, it creates a presumption that the requirements of Rule 7 are adequate to meet requirements of the CWA. Therefore, if Sierra Club is to prevail on its claims, it must present sufficient evidence to show that either (1) the IDEM did not comply with the requirements of Rule 7 or (2) the terms and conditions of the Modification are not, in fact, adequate to ensure compliance with water quality standards. As Sierra Club does not allege the former, then it must prove the latter. This is consistent with 327 IAC 15-2-9(b). This rule states that the commissioner of the IDEM may require an individual permit if any one of six conditions exists. Subsection (1) of this rule states:

The applicable requirements contained in this article are not adequate to ensure compliance with:

(A) water quality standards under 327 IAC 2-1 or 327 IAC 2-1.5; or

(B) the provisions that implement water quality standards contained in 327 IAC 5.

11. This language clearly contemplates that there will be instances when the provisions of a general permit rule are not "adequate to ensure compliance with water quality standards." However, in order to show that the IDEM abused its discretion in not requiring an individual permit, Sierra Club must present evidence as to how the specific terms and conditions of the Modification will not ensure compliance with water quality standards. This necessitates the production of evidence regarding the specific Discharges authorized under the Modification, including the constituents of the Discharges and the receiving waters.
12. The IDEM also contends that this matter is not ripe for administrative review as the IDEM has not explicitly responded to Sierra Club's July 31, 2009 request for an individual permit for this Mine. The IDEM argues that it must act on this request before Sierra Club can request administrative review. First of all, the ELJ has already ruled against the IDEM on this proposition. *See Findings of Fact, Conclusions of Law and Order Regarding the Scope of De Novo Review Before the OEA, dated July 29, 2012, Conclusions of Law #5.*
13. The IDEM points to the fact that in 2009 Sierra Club asked the IDEM to require individual permits for all coal mines currently operating under Rule 7. The IDEM did not accede to Sierra Club's request; instead it asked for additional information. This is where the matter was left until the IDEM modified the Rule 7 permit for the Bear Run Mine and Sierra Club appealed the Modification. The IDEM argues that because it never made an explicit determination as to whether an individual permit should be required for this Mine, the issue is not properly before the OEA. The ELJ agrees with the IDEM that the decision to require individual permits under 327 IAC 15-2-9(b) is a separate action from the IDEM's decision to modify the Rule 7 permit. However, the basis of Sierra Club's appeal is not that the IDEM

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failed to act on its petition submitted under 327 IAC 15-2-9(b), *but* that IDEM's approval of the Modification did not meet the requirements of 327 IAC 15-7 and that *the proper remedy* is an individual permit. This is a fine distinction. The ELJ rules against the IDEM on this issue.

14. The ELJ has already dismissed Counts 7 and 8 of the Petition on the grounds that a challenge to Rule 7 was not timely filed. IDEM continues to argue that this is what Sierra Club seeks through Counts 1 through 6 of its Petition. However, Sierra Club explicitly states that this is not so.⁹ The ELJ does not agree with the IDEM's assertion that the ELJ must, in order to find that the Modification was improperly issued, find that Rule 7 is invalid. Clearly, the Water Pollution Control Board, in promulgating 327 IAC 15-2-9(b), contemplated that there would be instances where an individual permit was preferable to a permit by rule and granted the IDEM the authority to require one. Sierra Club alleges that the Modification was improperly issued and as its remedy, requests that the OEA remand the permit back to the IDEM so that it can issue an individual permit for this Mine that contains terms and conditions that address the alleged deficiencies. The ELJ may find that the Modification was improperly issued and that an individual permit is the appropriate remedy without invalidating Rule 7.

Count One

15. As to Count One, Sierra Club's position is that IDEM failed to ensure that the Discharges would comply with water quality standards (i) because it did not conduct a reasonable potential analysis to determine whether water quality based effluent limitations ("WQBEL") were necessary to control the Discharges, and (ii) because it authorized the Discharges without an approved Total Maximum Daily Load ("TMDL") or Wasteload Allocation ("WLA").
16. IDEM's position is that the specific terms of Rule 7 cannot be challenged in this proceeding; that the issue of whether IDEM should have required Peabody to apply for an individual permit is not ripe for review; and that none of the factors in 327 IAC 15-2-9(b) apply to the Discharge that would allow IDEM to require Peabody to apply for an individual permit for the Mine.

⁹ "Once and for all, Petitioner's permit appeal is not 1) a challenge to whether the blanks on the NOI form were filled out correctly; 2) a petition for an individual permit; 3) a *facial challenge to the validity of the general permit rules*; 4) an impeachment of the coal mining industry; or 5) a discourse on proper regulation of coal mining." Sierra Club's Reply to Peabody's and IDEM's Responses Regarding the Scope of the OEA's De Novo Review, filed February 13, 2012, pg. 2.

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17. Peabody's position is that to the extent Sierra Club's claim challenges the validity of Rule 7, it cannot be decided by the OEA; and, to the extent Sierra Club's claim seeks issuance of an individual permit pursuant to 327 IAC 15-2-9(b)(1), the undisputed evidence of record relevant to Count One demonstrates (i) that the Discharges will not cause or contribute to a violation of water quality standards, and (ii) that an individualized assessment of the Discharges is not required.

18. 40 CFR 122.4 states: No permit may be issued:

- (i) To a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards. The owner or operator of a new source or new discharger proposing to discharge into a water segment which does not meet applicable water quality standards or is not expected to meet those standards even after the application of the effluent limitations required by sections 301(b)(1)(A) and 301(b)(1)(B) of CWA, and for which the State or interstate agency has performed a pollutants load allocation for the pollutant to be discharged, must demonstrate, before the close of the public comment period, that:
 - (1) There are sufficient remaining pollutant load allocations to allow for the discharge; and
 - (2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards. The Director may waive the submission of information by the new source or new discharger required by paragraph (i) of this section if the Director determines that the Director already has adequate information to evaluate the request. An explanation of the development of limitations to meet the criteria of this paragraph (i)(2) is to be included in the fact sheet to the permit under § 124.56(b)(1) of this chapter.
- (C) Only two of the Discharges discharge into impaired waters (Buttermilk Creek). In the 2008 303(b) list, Buttermilk Creek is impaired for TDS and sulfate. All of the other Discharges discharge into segments of creeks that are listed as impaired downstream from the points of discharge. 40 CFR 122.4 specifically applies to new dischargers "proposing to discharge into a water segment which does not meet applicable water quality standards or is not expected to meet those standards even after the application of the effluent limitations". IDEM assesses the quality of surface waters by individual segments or assessment units, which vary in length. *Arthur Dep.*¹⁰ 17:8-17:9 & 17:17-17:18. Segments or "reaches" are designated based on IDEM's determination that an assessment of water quality anywhere on the reach would be the same. *Arthur Dep.* 17:10-17:16. Designation of a reach as

¹⁰ Attached to Permittee/Respondent Peabody Midwest Mining, LLC's Memorandum in Opposition to Petitioner Sierra Club's Motion for Summary Judgment, filed on February 15, 2013.

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“impaired” does not necessarily apply to the reaches upstream and downstream, unless IDEM determines that an assessment is representative of water quality conditions in the other streams. *Arthur Dep. 18:11-18:2-, 42:25-43:6.*

- (D) The ELJ does not find Sierra Club’s arguments that “IDEM should have considered the Bear Run Mine’s impact on *all* downstream waters, not just those into which an outfall directly discharges”¹¹ to be persuasive. The use of the word “segment” in 40 CFR 122.4(i) is significant and the ELJ concludes that this rule applies only when a discharge is made directly into the impaired segment.
- (E) In relation to the Discharges that discharge into impaired segments of Buttermilk Creek, Sierra Club has presented no evidence (1) of the specific constituents of the Discharges, including what metals are contained in the Discharges, the concentration of TSS in the Discharges, or the pH of the Discharges; (2) the specific location in the receiving waters the impairment exists in relation to the outfalls; (3) the water quality of the receiving waters for those Discharges; (4) whether the Discharges will cause any exceedances of applicable water quality standards; or (5) whether the identified impairments are the result of discharges from coal mines.
- (F) Indiana’s surface water standard for TDS was deleted in 2005. See 28 IR 2046. Because Indiana had no TDS numeric standard at the time of the Permit approval, it was not necessary to conduct a TMDL analysis for those stream segments identified on IDEM’s 2008 Section 303(d) list as impaired for TDS.
- (G) IDEM revised the minimum surface water quality standards for sulfates in 2008 to allow discharges at a greater concentration of sulfates in certain waters. See 20080618-IR-3270070185FRA (May 22, 2008, 10:40 a.m.). Because IDEM had revised the minimum surface water quality standards for sulfates to allow discharges of a greater concentration of sulfates at the time of the Permit Approval, it was not necessary to conduct a TMDL analysis for those stream segments identified on IDEM’s 2008 Section 303(d) list as impaired for sulfates.
- (H) Sierra Club has failed to meet its burden on the motion for summary judgment on Count 1. The ELJ concludes that judgment should be entered in favor of the IDEM and Peabody.

¹¹ Sierra Club’s Response to Peabody’s Objections to Certain Sierra Club Evidentiary Submissions, filed April 12, 2013, pg. 2.

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Count Two

- (I) As to Count Two, Sierra Club's position is that IDEM failed to assess the existing beneficial uses of the receiving waters for the Discharges by identifying the existing uses of downstream waters and the pollutants in the proposed waste stream, and by evaluating the impact of the Discharges on those existing uses.
- (J) IDEM's position is that the specific terms of Rule 7 cannot be challenged in this proceeding; that the issue of whether IDEM should have require Peabody to apply for an individual permit is not ripe for review; and that none of the factors in 327 IAC 15-2-9(b) apply to the Discharge that would allow IDEM to require Peabody to apply for an individual permit for the Mine.
- (K) Peabody's position is that to the extent Sierra Club's claim challenges the validity of Rule 7, it cannot be decided by the OEA; and, to the extent Sierra Club's claim seeks issuance of an individual permit pursuant to 327 IAC 15-2-9(b)(1), the undisputed evidence of record relevant to Count Two demonstrates that the Discharges will not impact the existing beneficial uses of the receiving waters and that an individualized assessment of the Discharges is not required.
- (L) 327 IAC 15-2-7 states "Compliance with a general permit rule constitutes compliance with all applicable standards and limitations of the Federal Act and state law." This includes the water quality standards found in 327 IAC 2-1-6 and 327 IAC 15-7-7. It is presumed that Rule 7 is adequate to protect beneficial uses. IDEM has determined generally that none of the pollutants in discharges from coal mines will interfere with existing uses provided that the concentrations of those pollutants are limited as required by Rule 7. *Roush* 23:22-24:7.
- (M) Sierra Club has presented no evidence that the discharges from the Mine contain pollutants that will interfere with existing uses provided that the concentrations of pollutants in the discharges do not exceed the limits established by Rule 7.
- (N) Sierra Club has presented no evidence that Peabody's NOI letter was deficient. Peabody's submission of its NOI complied with all requirements of the General Permit and Rule 7. The ELJ concludes that summary judgment should be entered in favor of the IDEM and Peabody on this count.

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Count Three

- (O) As to Count Three, Sierra Club's position is that IDEM failed to conduct a required Tier II antidegradation analysis of the Discharges.
- (P) IDEM's position is that the specific terms of Rule 7 cannot be challenged in this proceeding; that the issue of whether IDEM should have required Peabody to apply for an individual permit is not ripe for review; and that none of the factors in 327 IAC 15-2-9(b) apply to the Discharge that would allow IDEM to require Peabody to apply for an individual permit for the Mine.
- (Q) Peabody's position is that to the extent Sierra Club's claim challenges the validity of Rule 7, it cannot be decided by the OEA; and, to the extent Sierra Club's claim seeks issuance of an individual permit pursuant to 327 IAC 15-2-9(b)(1), the undisputed evidence of record relevant to Count Three demonstrates that the Discharges will not significantly impact the quality of the receiving waters and that an individualized analysis is not required.
- (R) The applicable portions of 40 CFR 131.12 state:
- (a) The State shall develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy pursuant to this subpart. The antidegradation policy and implementation methods shall, at a minimum, be consistent with the following:
- (1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.
 - (2) Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.

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(S) 327 IAC 2-1-2 (repealed 2012) states:

The following policies of nondegradation are applicable to all surface waters of the state:

- (1) For all waters of the state, existing beneficial uses shall be maintained and protected. No degradation of water quality shall be permitted which would interfere with or become injurious to existing and potential uses.
- (2) All waters whose existing quality exceeds the standards established herein as of February 17, 1977, shall be maintained in their present high quality unless and until it is affirmatively demonstrated to the commissioner that limited degradation of such waters is justifiable on the basis of necessary economic or social factors and will not interfere with or become injurious to any beneficial uses made of, or presently possible, in such waters. In making a final determination under this subdivision, the commissioner shall give appropriate consideration to public participation and intergovernmental coordination.

(T) Sierra Club alleges that a Tier II analysis should have been conducted. A Tier II analysis is required to ensure that a new or increased discharge will not contribute to a lowering of water quality in high quality waters. In this case, each segment which is not listed as impaired is considered a high quality water.

(U) The Modification allows for new discharges. Therefore, it is relatively clear from the rule in effect at the time that this Modification was made that a Tier II antidegradation review was necessary. If Peabody believed that economic and social factors made the discharges necessary, it was required to make an “affirmative” showing at the time it submitted its NOI.

(V) Further, the Court in *Ohio Valley Env'tl. Coalition v. Horinko*, 279 F. Supp. 2d 732, 762, 2003 U.S. Dist. LEXIS 15359, 57 ERC (BNA) 1639 (S.D. W. Va. 2003) held that antidegradation reviews must be done even for general permits, saying that “the EPA has not explained how the type of review called for in § 131.12(a)(2), which is location-specific and requires public participation, can be done on a statewide or nationwide basis.” The ELJ finds this case persuasive in light of the language of 40 CFR 131.12 and 327 IAC 2-1-2.

(W) In 2012, Indiana repealed 327 IAC 2-1-2 and adopted 2-1.3-1(c). This rule states:

- (c) The antidegradation implementation procedures for activities covered by an NPDES general permit authorized by the department apply according to the following:

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- (1) The department shall complete an antidegradation review of the NPDES general permits.
 - (2) After an antidegradation review of an NPDES general permit is conducted, activities covered by that NPDES general permit are not required to undergo an additional antidegradation review.
- (X) The current rule was not in effect at the time that the Modification was issued and is not conclusive regarding this issue. Further, even this rule does not authorize the issuance of general permits without an antidegradation review. The rule requires Indiana to undertake a review of NPDES general permits. Indiana has not completed this review. Peabody admits that “IDEM is in the process of reviewing its general permits to determine whether they satisfy all aspects of the antidegradation standards.”¹² However, Peabody then goes on to argue that the current rule (which was not in effect in 2010) authorizes the Modification even though an antidegradation review was not completed.
- (Y) The ELJ has ruled against Sierra Club on several issues because Sierra Club failed to present specific evidence regarding the Discharges. In this instance, this is not necessary as the rule (327 IAC 2-1-2) places the burden on the burden on the permittee to affirmatively demonstrate that “limited degradation of such waters is justifiable on the basis of necessary economic or social factors and will not interfere with or become injurious to any beneficial uses made of, or presently possible, in such waters.”¹³ Peabody failed to do so at the time it submitted its application for the Modification. In addition, there has been no evidence provided that there has been any public participation on this issue.
- (Z) Summary judgment should be granted in favor of Sierra Club. The Modification is remanded to the IDEM to conduct the antidegradation review at which time Peabody may demonstrate that the Discharges will not degrade the waters or that degradation is necessary for economic or social factors.

Count Four

- (AA) As to Count Four, Sierra Club contends that the IDEM’s failure to issue an individual permit to Peabody was arbitrary, capricious and an abuse of discretion because the applicable requirements are not adequate to ensure compliance with water quality standards, and the Mine is not in compliance with the terms and conditions of the general permit rule.

¹² Appendix A to Permittee/Respondent Peabody Midwest Mining LLC’s Memorandum in Opposition to Petitioner Sierra Club’s Motion for Summary Judgment, page 24.

¹³ 327 IAC 2-1-2(2).

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- (BB) IDEM's position is that the specific terms of Rule 7 cannot be challenged in this proceeding; that the issue of whether IDEM should have required Peabody to apply for an individual permit is not ripe for review; and that none of the factors in 327 IAC 15-2-9(b) apply to the Discharge that would allow IDEM to require Peabody to apply for an individual permit for the Mine.
- (CC) Peabody's position is that the undisputed evidence of record relevant to Count Four demonstrates that the Discharges will not contain different regulated constituents or a higher concentration of such constituents than generally found in discharges from Indiana coal mines, and therefore do not required an individual permit under 327 IAC 15-2-9(b)(1), and that the Mine's three instances of non-compliance with total suspended solids ("TSS") limits do not require issuance of an individual permit under 327 IAC 15-2-9(b)(2).
- (DD) Sierra Club has presented no evidence (1) of the specific constituents of the Discharges, including what metals are contained in the Discharges, the concentration of TSS in the Discharges, or the pH of the Discharges; (2) the specific location in the receiving waters the impairment exists in relation to the outfalls; (3) the water quality of the receiving waters for those Discharges; (4) whether the Discharges will cause any exceedances of applicable water quality standards; or (5) whether the identified impairments are the result of discharges from coal mines. Further, Sierra Club has presented no evidence that Peabody's NOI letter failed to comply with all requirements of the General Permit and Rule 7.
- (EE) 327 IAC 15-2-7 states "Compliance with a general permit rule constitutes compliance with all applicable standards and limitations of the Federal Act and state law." This includes the monitoring requirements found in 327 IAC 15-7-7. It is presumed that the requirements of Rule 7 are adequate to comply with the CWA.
- (FF) Application of 327 IAC 15-2-9(b)(2) is at IDEM's discretion. Because the evidence in the record (1) identifies only three excursions of permit limitations at the Mine since 2005; (2) does not establish that the excursions were serious from a public health perspective; and (3) establishes that the Mine is able to address the compliance issue associated with the excursions under a general permit, the IDEM did not abuse its discretion by not requiring an individual permit on the basis of Peabody's minimal noncompliance.

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- (GG) Summary judgment should be entered in Peabody's and the IDEM's favor on this issue.

Count Five

- (HH) As to Count Five, Sierra Club contends that the Permit is not an enforceable NPDES permit because it does not contain specific effluent limits nor identifies best management practices.
- (II) IDEM's position is that the specific terms of Rule 7 cannot be challenged in this proceeding; that the issue of whether IDEM should have required Peabody to apply for an individual permit is not ripe for review; and that none of the factors in 327 IAC 15-2-9(b) apply to the Discharge that would allow IDEM to require Peabody to apply for an individual permit for the Mine.
- (JJ) Peabody's position is that to the extent Sierra Club's claim challenges the validity of Rule 7, it cannot be decided by the OEA; and, to the extent Sierra Club's claim seeks issuance of an individual permit pursuant to 327 IAC 15-2-9(b)(1), the undisputed evidence of record relevant to Count Five demonstrates that the terms and conditions of Rule 7 are not insufficient and unenforceable and that an individualized assessment regarding the sufficiency of those terms with respect to the Discharges is not required.
- (KK) It should be iterated that the ELJ has already determined that the OEA may not this is not a challenge to Rule 7. Sierra Club states, "In this case IDEM has failed to issue a valid NPDES permit to the Bear Run Min because Rule 7 does not contain the effluent limitations and permit conditions necessary to render it a valid NPDES permit."¹⁴ Sierra Club's asserts that Rule 7, in and of itself, is insufficient to comply with the requirements of the CWA.
- (LL) I.C. § 4-21.5-7-3(a) sets out the parameters for OEA review. Sierra Club explicitly argues that Rule 7 is not a valid NPDES permit. I.C. § 4-21.5-7-3(a) provides that the OEA may only hear challenges to rules "made pursuant to I.C. § 4-22-2-44 or I.C. § 4-22-2-45". These 2 statutes provide relief for challenges made on procedural grounds within two (2) years of the rule's effective date. Sierra Club does not allege that Rule 7 is invalid due to defects in the rulemaking procedure. Further, Rule 7 was initially

¹⁴ Sierra Club's Memorandum in Support of Its Motion for Summary Judgment, page 21.

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adopted in 1994 and readopted in 2001 and 2007. Sierra Club's challenge was not made within two (2) years.

- (MM) On this basis, Sierra Club's arguments must be rejected and summary judgment should be entered in favor to the IDEM and Peabody.

Count Six

- (NN) As to count Six, Sierra Club alleges that the Permit does not require adequate monitoring of discharges and receiving waters.
- (OO) IDEM's position is that the specific terms of Rule 7 cannot be challenged in this proceeding; that the issue of whether IDEM should have required Peabody to apply for an individual permit is not ripe for review; and that none of the factors in 327 IAC 15-2-9(b) apply to the Discharge that would allow IDEM to require Peabody to apply for an individual permit for the Mine.
- (PP) Peabody's position is that to the extent Sierra Club's claim challenges the validity of Rule 7, it cannot be decided by the OEA; and, to the extent Sierra Club's claim seeks issuance of an individual permit pursuant to 327 IAC 15-2-9(b)(1), the undisputed evidence of record relevant to Count Six demonstrates that Rule 7's monitoring requirements are not insufficient and unenforceable and that an individualized assessment regarding the sufficiency of those terms with respect to the Discharges is not required.
- (QQ) 327 IAC 15-2-7 states "Compliance with a general permit rule constitutes compliance with all applicable standards and limitations of the Federal Act and state law." This includes the monitoring requirements found in 327 IAC 15-7-7. It is presumed that Rule 7 is adequate to comply with the CWA. These Discharges are periodic discharges related to precipitation events and not easily subject to routine monitoring. The monitoring requirements of Rule 7 take that into account. Sierra Club, to prevail in summary judgment, must present sufficient evidence about the constituents in these Discharges or the water quality of the receiving streams which justifies a conclusion that the monitoring requirements in Rule 7 are inadequate.
- (RR) Further, Sierra Club has presented no evidence that Peabody's NOI letter was deficient.

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(SS) There are no genuine issues of material fact. Sierra Club has not met its burden on summary judgment. The ELJ concludes that the IDEM and Peabody have met their burden and summary judgment should be entered in their favor on Count 6.

PARTIAL FINAL ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Sierra Club's Motion for Summary Judgment is **DENIED regarding Counts 1, 2, 4, 5 and 6** and judgment is entered in favor of the Indiana Department of Environmental Management and Peabody Midwest Mining, LLC. Sierra Club's Motion for Summary Judgment is **GRANTED regarding Count 3.**

You are further notified that pursuant to provisions of I.C. § 4-21.5-7-5, the Office of Environmental Adjudication serves as the ultimate authority in administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of I.C. § 4-21.5. Pursuant to I.C. § 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED this 11th day of September 2013 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge